LIBRARY
SUPREME COURT, U. S.

No. 71-803

In The Supreme Court of The United States

Supreme Court, U.S.
FILED
DEC 18 197
E. ROBERT SEAVER, CLERK

OCTOBER TERM, 1971

ROBERT ALOYSIOUS MASON,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

NEAL PEREIRA
Suite 1 Milford Law Building
1150 Union Street
San Diego, California 92101
Telephone: (714) 239-8101

Attorney for Petitioner

SUBJECT INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	7
APPENDICES	8
Appendix A — Opinion of the Supreme Court of the State of California	
Appendix B — Opinion of the California Court of Appeal	

TABLE OF AUTHORITIES CITED

Page

CASES

Johnson v. Zerbst, 304 U.S. 458 6

CONSTITUTIONAL PROVISIONS

United States Constitution,
Fourth Amendment 2,6

United States Constitution,
Fourteenth Amendment, Section 1 3,6

STATUTES

28 U.S.C., Section 1257(3) 2

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. _____

ROBERT ALOYSIOUS MASON,

Petitioner,

v.

THE PEOPLE OF THE STATE
OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioner, Robert Aloysious Mason, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of California entered in this proceeding on September 22, 1971.

OPINIONS BELOW

The opinion of the Supreme Court of the State of California, 5 Cal. 3d 759, 97 Cal. Rptr. 302 (1971) appears in Appendix A hereto.

The opinion of the California Court of Appeal, 14 Cal. App. 3d 854, 92 Cal. Rptr. 628 (1971), appears in Appendix B hereto.

JURISDICTION

The judgment of the Supreme Court, the highest state court in California, was entered on September 22, 1971. The judgment is incorporated in the opinion of the Supreme Court which appears in Appendix A hereto. This petition is filed within 90 days from the date aforesaid. Jurisdiction is conferred on this court by 28 U.S.C., Section 1257(3).

QUESTION PRESENTED

Whether a condition of probation which states that a person; "submit his person, place of residence, vehicle, to search and seizure at any time of the day or night, with or without a search warrant, whenever requested to do so by the Probation Officer or any law enforcement officer;" gives the police absolute right to search without consent.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath

> or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Constitution of the United States, Fourteenth Amendment, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The facts relevant to the question presented are uncontroverted and therefore are presented to the Court in a summary fashion.

On January 25, 1970 a burglary of a medical center was discovered. (I 17-18.) Petitioner was a suspect since his automobile was seen in the parking lot of the medical center during the late evening hours of January 24, 1970. (I 113-116.)

Police learned that Petitioner had been previously convicted of Possession of Marijuana and that on September 3, 1969 Petitioner was granted probation. Police also learned that as a condition of Petitioner's

probation Petitioner was to "submit his person, place of residence, vehicle, to search and seizure at any time of the day or night, with or without a search warrant, whenever requested to do so by the Probation Officer or any law enforcement officer." One of the investigators, Officer McCain, on a previous occasion had seen a copy of the probation order involved. (II 67.)

On January 27, 1970 police went to Petitioner's residence and knocked on the door. (II 26-27.) Petitioner opened the door. Officer McCain advised Petitioner that the reason for his being there was to search the premises, Petitioner, and Petitioner's vehicle for narcotics and contraband. (II 26-27.)

Petitioner was told that the search was to be pursuant to the probation order. The police did not give Petitioner an opportunity to refuse to allow a search. (II 69-70.)

Police had gone to the residence in order to search and arrest. (II 43.) Petitioner was arrested approximately 5 minutes after police entered. The basis for the officers' desire to arrest was because of the fact that Petitioner's auto had been observed in the area of the burglary and due to the Petitioner's probationary status. (II 43-44.)

Items of contraband were found throughout the house but not in the room where Petitioner had been arrested. After the arrest Petitioner was taken away and other officers stayed to search. (II 44.)

There were no warrants, nor was there consent or probable cause. The basis for the search was the condition of probation. (II 28-29.)

Petitioner made a pretrial motion to suppress the contraband on May 11, 1970 in the Superior Court, San Diego County. The motion to suppress was granted and the case was dismissed. (CT 13.)

Respondent appealed and contended in the Court of Appeal that the granting of the motion to suppress evidence was in error. The Court of Appeal rejected Respondent's contention and affirmed the decision to suppress the evidence. (See Appendix B.) The Supreme Court of the State of California granted a hearing and, with two justices dissenting, reversed the decision of the Court of Appeal. The California Supreme Court then vacated the order of dismissal of Petitioner's case and remanded the matter to the Superior Court. (See Appendix A.) The matter is now set for trial on January 19, 1972.

REASONS FOR GRANTING THE WRIT

A condition of probation (not parole) which directs a probationer to submit to a search "whenever requested" is one commonly imposed upon convicted drug and narcotic offenders. That condition of probation should be simply a condition of probation, which if not complied with subjects the probationer to an arrest for violation of his probation and subsequent proceedings thereon which could include a prison sentence. Hence, if the probationer refuses to allow a search when requested by police his probation could be revoked.

The condition of probation should not give the police powers outside the Federal Constitution, especially when the power is used for general law enforcement purposes rather than assisting probation

officers in their administrative function of supervision.

The California Supreme Court, in its decision, has created an advance consensual search given at the time a person receives probation. The decision allows police, in mass, to arbitrarily enter a probationer's home, at any hour, and search without asking for consent (see Appendix A). In fact, Counsel for Petitioner is informed that computer lists may be established listing persons on probation subject to the condition involved. These lists would be given to law enforcement agencies to be used arbitrarily thereby allowing a probationer's residence to be searched for no valid reason.

The California Supreme Court states that the words "whenever requested" in the condition of probation mean that notice must be given but no consent need be obtained. This simply gives the police power to search limited only by a notice requirement. This is inconsistent with the holdings of this Court. A warrantless search is valid only under exceptional circumstances, or when intelligent and voluntary consent has been given. This Court in Johnson v. Zerbst, 304 U.S. 458 held that it is imperative that "courts indulge every reasonable presumption against waiver" and that the courts should not presume acquiescence in the loss of fundamental rights.

The California Supreme Court's decision glides over the presumption against waiver. That Court has interpreted the meaning of the condition as giving police a general warrant to search and enter homes of those persons whose probation orders contain the condition at issue. Hence, the case law interpreting the search provisions of the Fourth and Fourteenth Amendments has been, in part, effectively thwarted and an intolerable

social problem has been created by giving police this general warrant to search.'

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of California.

Respectfully submitted,

NEAL PEREIRA

Attorney for Petitioner

APPENDIX "A"

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

IN BANK

THE PEOPLE,	FILED
	SEP 22 1971
Plaintiff and Appellant,	G. E. BISHEL, Clerk
v.	S. F. Deputy
ROBERT ALOYSIOUS MASON,	
Defendant and Respondent.	

This case involves the legality of a search conducted pursuant to the terms of a condition of defendant's probation requiring him to submit to a search by police officers at any time without the necessity of a search warrant.

Defendant was accused of burglary with an acetylene torch (Pen. Code, § 464), receiving stolen property (Pen. Code, § 496.1), possessing restricted dangerous drugs (Health & Saf. Code, § 11910), possessing these drugs for sale (Health & Saf. Code, § 11911) and possessing marijuana (Health & Saf. Code, § 11530). At a pretrial hearing in superior court, defendant moved

SEE DISSENTING OPINION

to suppress certain evidence on the ground that it was the product of an illegal search. (Pen. Code, § 1538.1.) The court granted the motion to suppress and; since the People had no further evidence against defendant, dismissed the charges against him. (Pen Code, § 1385.) The People appeal from the order of dismissal. (Pen. Code, § 1238, subd. (a), subsec. (7).)

We have concluded that the search was proper and that the order of dismissal must be set aside and the case remanded for trial.

The facts leading to defendant's arrest are as follows: In January 1970 burglars broke into the Alvarado Medical Center in San Diego and stole money, stamps, retail sales items, a radio, 4,000 hypodermic needles and over 30,000 pills and capsules, mostly barbituates and amphetamines. At the time of the burglary, a hospital employee observed suspicious activity by two men in the parking lot; a second employee noted the license number of their car, and reported it to the police. The officers traced the car to defendant, living at 2124 Reed Street in San Diego, and discovered that defendant had registered as a narcotics offender and was on probation for possessing marijuana in 1969. The officers noted that one of the conditions of defendant's probation required him to "submit his person, place of residence, vehicle, to search and seizure at any time of the day or night, with or without a search warrant, whenever requested to do so by the Probation Officer or any law enforcement officer."

The officers went to defendant's residence and saw his car parked in front. One of the officers knocked on the door of the house, loudly identified himself and announced that he wanted to search the apartment.

Defendant opened the door and an officer informed him that he had reason to believe defendant had participated in a burglary and was subject to search and seizure by court order as a condition of his probation. According to the officer, defendant replied that he was subject to such a condition. Thereupon, without giving defendant the opportunity to refuse or grant permission for a search, the officers entered the house, searched and found in the kitchen a radio which resembled the one stolen from the Medical Center. They arrested defendant, took him away, and subsequently searched defendant's car and house, uncovering further items of contraband.

The foregoing search was conducted without a warrant and, at least in part, extended in scope beyond the limits of a reasonable search incidental to arrest, as set forth in Chimel v. California, 395 U.S. 752. The People contend, however, that the warrantless search was justified by the terms of defendant's condition of probation that he submit to a search, with or without a warrant, whenever requested by police officers. We agree that under the circumstances in the instant case, the probation condition authorized the search of defendant's residence and car. 1/

Our analysis of the question requires a two-step approach. First, we must determine whether by the terms of the condition the officers were permitted to

---

1/ Although it could be argued that defendant impliedly consented to the search by not objecting to it, it is unnecessary to reach that question in view of our determination that the probation condition authorized a search even in the absence of defendant's consent thereto.

conduct a particular search without obtaining defendant's prior consent to that search. Second, if no prior consent was required, we must determine whether that condition constituted an unreasonable or unconstitutional invasion of defendant's rights.

Defendant contends that since the condition required him to submit to a search "whenever requested to do so," the officers should have requested permission to search, thereby affording defendant the opportunity to grant or refuse permission. To so construe the condition would, however, render it utterly meaningless. A "condition" implies a qualification or restriction; accordingly, a condition to a grant of probation contemplates some limitation upon the probationer's rights. (See In re Bushman, 1 Cal.3d 767, 776.) If defendant had the right to withhold his consent to a warrantless search, the protection thereby afforded him would have been as broad as that afforded all other persons under the Fourth Amendment. We conclude that the probation condition, by use of the words "with or without a search warrant," was intended to restrict defendant's right to refuse a warrantless search, and that the words "whenever requested" were added to require the officers to notify defendant before conducting a search of his house or car. Thus, a search made without defendant's knowledge would have been invalid.

We also note that to accept defendant's interpretation of the probation condition would defeat the acknowledged purposes of such a provision to deter further offenses by the probationer and to ascertain whether he is complying with the terms of his probation. With knowledge he may be subject to a search by law enforcement officers at any time, he will be less inclined to have narcotics or dangerous drugs in his possession.

The purpose of an unexpected, unprovoked search of defendant is to ascertain whether he is complying with the terms of probation; to determine not only whether he disobeys the law, but also whether he obeys the law. Information obtained under such circumstances would afford a valuable measure of the effectiveness of the supervision given the defendant and his amenability to rehabilitation." (People v. Kern, 264 Cal. App. 2d 962, 965.)

Turning to the question of the validity of the condition as we have interpreted it, we are guided by the principles set forth in In re Bushman, supra, 1 Cal. 3d 767, 776-777, as follows: "When granting probation, courts have broad discretion to impose restrictive conditions to foster rehabilitation and to protect public safety. Penal Code section 1203.1 authorized the court to impose any 'reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, . . . and specifically for the reformation and rehabilitation of the probationer.' If the defendant considers the conditions of probation more harsh than the sentence the court would otherwise impose, he has the right to refuse probation and undergo the sentence. [Citations.] In such case he may challenge the legality of any proposed conditions of probation on an appeal from the judgment or on habeas corpus. [Citations.]

. . . .

"A condition of probation imposed pursuant to Penal Code section 1203.1 is invalid if it (1) has no relationship to the crime of which the defendant is convicted, (2) relates to conduct that is not itself criminal, or (3) requires or forbids conduct that is not reasonably related to future criminality. [Citation.]"

It seems beyond dispute that a condition of

probation which requires a prior narcotics offender to submit to a search meets the test set forth in Bushman, since that condition is reasonably related to the probationer's prior criminal conduct and is aimed at deterring or discovering subsequent criminal offenses. 2/ Indeed, the cases have held that such a condition is reasonable and valid, being "related to [the probationer's] reformation and rehabilitation in the light of the offense of which he was convicted." (People v. Kern, supra, 264 Cal. App. 2d 962, 965; see People v. Fitzpatrick, 3 Cal. App. 3d 824, 827; cf. People v. Osslo, 50 Cal. 2d 75, 103; People v. Williams, 247 Cal. App. 2d 394, 403-404.)

Defendant contends that a probation condition which requires submission to a warrantless search constitutes an unreasonable invasion of his Fourth Amendment rights. We have heretofore suggested, however, that persons conditionally released to society, such as parolees, may have a reduced expectation of privacy, thereby rendering certain intrusions by governmental authorities "reasonable" which otherwise would be invalid under traditional constitutional concepts, at least to the extent that such intrusions are necessitated by legitimate governmental demands.

2/ The high recidivism rate for narcotics offenders makes the instant probation condition particularly appropriate in narcotics cases. A recent California study indicates that "Over half (53 percent) of all drug offenders arrested in 1960 were rearrested for some type of drug offense within the next five years." (State of California Department of Justice, Follow-up Study of 1960 Adult Drug Offenders (1968), p. 2.)

(See In re Martinez, 1 Cal.3d 641, 647, fn. 6; cf. People v. Gilkey, 6 Cal.App.3d 183, 186-188, and cases cited.) Thus, a probationer who has been granted the privilege of probation on condition that he submit at any time to a warrantless search may have no reasonable expectation of traditional Fourth Amendment protection. 3/

It should be kept in mind that although the scope of the search in the instant case may have exceeded the permissible limits announced in Chimel v. California, supra, 395 U.S. 752, that case acknowledged the existence of "well recognized exceptions" to the general rule requiring a warrant in order to conduct a house search. (P. 763.) One of those exceptions, referred to in Katz v. United States, 389 U.S. 347, 358, footnote 22, is that "A search to which an individual consents meets Fourth Amendment requirements, Zap v. United States, 328 U.S. 624. . . ." (See also Vale v. Louisiana, 399 U.S. 30, 35.) The Zap case is controlling here, for it upheld the validity of an advance waiver of Fourth Amendment rights akin to the provisions of the probation condition before us. In Zap, a government contractor agreed to a contract provision that "The accounts and records of the contractor shall be open at

---

3/ We do not intend to suggest that one who has accepted such a condition to the grant of probation is thereafter barred from objecting to the unreasonable manner in which that condition is carried out by police officers. For example, a probationer who claims unlawful harrassment by officers in executing a search may seek appropriate relief from the trial court, including an amendment of the order of probation. (See People v. Kern, supra, 264 Cal.App.2d 962, 965.) Defendant makes no such claim in the instant case.

all times to the Government and its representatives . . . . " Certain evidence was uncovered during a subsequent government audit conducted in the contractor's absence, which evidence led to his conviction for fraud. In response to the contractor's claim that such evidence was illegally obtained, the court stated that "the law of searches and seizures as revealed in the decisions of this Court is the product of the interplay of the Fourth and Fifth Amendments. But those rights may be waived. And when petitioner, in order to obtain the Government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts. Whatever may be the limits of that power of inspection, they were not transcended here." (328 U.S. 624, 628.)

Similarly, in the instant case, when defendant in order to obtain probation specifically agreed to permit at any time a warrantless search of his person, car and house, he voluntarily waived whatever claim of privacy he might otherwise have had.

Defendant contends that various policy considerations should lead us to hold that police officers may not employ "self help" when a probationer refuses to consent to a search, but that the officers should simply report the matter to the probation officer who may initiate proceedings to revoke probation. Defendant points to the possibility that violence may occur when officers proceed to search a nonconsenting probationer's house, or that the rights of innocent third parties may be violated by the search. These factors are present, however, whenever officers conduct a house search, with or without a search warrant, and yet these considerations do not affect the validity of an otherwise proper

search. 4/ Moreover, if the only governmental remedy for a refusal to consent to a search was to seek a revocation of probation, the dual purposes of the probation condition, namely, deterrence and discovery of subsequent offenses, would be frustrated.

We conclude that the search conducted by the officers herein was reasonable and proper, and that the order of dismissal entered following the court's granting of defendant's motion to suppress should be vacated.

The order of dismissal is hereby vacated and the cause remanded to the Superior Court of San Diego County for further proceedings not inconsistent with this opinion.

BURKE, J.

WE CONCUR:

WRIGHT, C. J.

McCOMB, J.

MOSK, J.

SULLIVAN, J.

4/ The possibility of violence is minimized by the advance notice provided by the probation condition itself, and the requirement of that condition (similar in effect to the entry requirements of Pen. Code, §844) that the officers request a search before conducting it.

C O P Y

PEOPLE v. MASON

Crim. 15480

DISSENTING OPINION BY PETERS, J.

I dissent.

It is clear that the protection afforded by the Fourth Amendment extends to probationers. (In re Martinez (1970) 1 Cal. 3d 641, 647, fn. 6; People v. Rosales (1968) 68 Cal. 2d 299; cf. Martin v. United States (4th Cir. 1950) 183 F. 2d 436, 439.) The question is to what extent the state may deny or condition governmental benefits upon a waiver of Fourth Amendment rights. Our cases make clear that probationers may have a reduced right to Fourth Amendment protections, but that restrictions upon those rights must be narrowly drawn to meet needs for reformation and rehabilitation of the offender.

While the government is not totally barred from conditioning receipt of publicly conferred benefits upon a nonassertion of constitutional rights (Bagley v. Washington Township Hospital Dist. (1966) 65 Cal. 2d 499, 505), it may not condition such benefits upon "any terms that it may choose to impose, . . ." (Vogel v. County of Los Angeles (1967) 68 Cal. 2d 18, 21.) Rather, the general rule is set forth in Parrish v. Civil Service Commission (1967) 66 Cal. 2d 260, 271: "When . . . the conditions annexed to the enjoyment of a publicly conferred benefit require a waiver of rights secured by the Constitution, however well-informed and voluntary that waiver, the governmental entity seeking to impose those

conditions must establish: (1) that the conditions reasonably relate to the purposes sought by the legislation which confers the benefit; (2) that the value accruing to the public from imposition of those conditions manifestly outweighs any resulting impairment of constitutional rights; and (3) that there are available no alternative means less subversive of constitutional right, narrowly drawn so as to correlate more closely with the purposes contemplated by conferring the benefit. . . ."

The Parrish rule is a limitation not only on legislative impairments on constitutional rights, but also on judicial and administrative impairments, and applies to persons granted conditional freedom, including parolees (People v. Hernandez (1964) 229 Cal. App. 2d 143, 148) and probationers. (In re Allen (1969) 71 Cal. 2d 388, 391; In re Mannino (1971) 14 Cal. App. 3d 953, 967-969.) Although courts at one time characterized conferral of public sector benefits as a matter of grace or privilege, unsusceptible to attack by those who sought the benefit, it is now well settled that unconstitutional conditions of probation may be attacked. (In re Bushman (1970) 1 Cal. 3d 767, 776; cf. Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law (1968) 81 Harv. L. Rev. 1439; Note, Parole Status and the Privilege Concept, 1969 Duke L. J. 139.)

Of course in construing the validity of probation conditions, we recognize that courts have broad discretion to impose "reasonable conditions . . . to the end that justice may be done . . . and specifically for the reformation and rehabilitation of the probationer." (Pen. Code, § 1203.1, italics added; In re Bushman, supra, 1 Cal. 3d 767, 776.) But what is reasonable depends on the circumstances. Generally we have held

that a condition of probation is invalid if it "requires or forbids conduct that is not reasonably related to future criminality." (In re Bushman, supra, 1 Cal. 3d 767, 777; People v. Domínguez (1967) 256 Cal. App. 2d 623, 627.) Where a condition of probation requires a waiver of precious constitutional rights, the condition must be narrowly drawn; to the extent that it is overbroad it is not reasonably related to the compelling state interest in reformation and rehabilitation and is an unconstitutional restriction on the exercise of fundamental constitutional rights. (In re Mannino, supra, 14 Cal. App. 3d 953, 967-969; cf. Parrish v. Civil Service Commission, supra, 66 Cal. 2d 260, 271.) "A diminution of Fourth Amendment protection . . . can be justified only to the extent actually necessitated by the legitimate demands of the operation of the parole process . . . ." (In re Martinez, supra, 1 Cal. 3d 641, 647, fn. 6; italics added.) A probationer may be entitled to a diminished expectation of privacy because of the necessities of the correctional system, but his expectation may be diminished only to the extent necessary for his reformation and rehabilitation.

I cannot believe that such a total denial of Fourth Amendment rights is necessary or even desirable in rehabilitating a criminal offender. First, the proper level of surveillance and interference with personal rights is in part dictated by the gravity of the crime committed. Were the crime possession of beer by a 20-year-old minor (Bus. & Prof. Code, § 25658, subd. (b)), I frankly doubt whether the members of this court would consider a total denial of Fourth Amendment rights "reasonable." Yet the crime involved here--possession of marijuana--is rapidly becoming recognized as no greater a threat to the integrity of our social fabric. (See, e.g., Kaplan, Marijuana--The New

Prohibition (1970): The San Francisco Committee on Crime, A Report on Non-Victim Crime in San Francisco, Part III, Dangerous Drugs and Narcotics (1971).)

Even if possession of marijuana be deemed as dangerous as possession of more dangerous drugs, the proper authority for determining whether a probationer or parolee is obeying the terms of his conditional release is the probation or parole officer. It is this individual to whom the state has entrusted the ticklish task of guiding the released offender toward a law-abiding style of life. The probation or parole officer is not just another faceless man in uniform: at best he is a trusted counselor and advisor as well as a firm but dispassionate disciplinarian. At the very least he is more aware of the necessity for surveillance in each individual case than are other law enforcement officers. The objective of deterring future criminal conduct by the probationer may in some cases justify surprise searches by the probation officer assigned to the individual's case. I can see no justification, however, in subjecting the probationer to any search by any law enforcement officer at any time.

The majority appear to assert that prior consent to search by any law enforcement officer is necessary to the discovery of future offenses. We do not conditionally release a man because we wish to trap him in future offenses. Nor do we provide a probation officer for the purpose of being a one-man shadow of the probationer. Surely it is a proper purpose of the probation officer to ascertain whether the probationer is obeying all laws and the terms of his probation. But this function is undertaken with the goal of rehabilitating the offender. Law enforcement officers generally, on the other hand, do not have such goals in mind. It must be neither their

role nor their prerogative to treat probationers as a specially suspect class of citizens. I can see no justification for extending the waiver of all Fourth Amendment rights to all law enforcement officers. I would hold the condition overbroad.

Moreover, there is no necessity for law enforcement officers to have such a privilege, given their lack of involvement in the rehabilitative process. Law enforcement officers investigating commission of a crime may properly question or search a probationer or parolee. And in considering the propriety of searches without warrants, one's status as a probationer or parolee may be of weight in giving officers probable cause to search. (Martin v. United States, supra, 183 F. 2d 436, 439: White, The Fourth Amendment Rights of Parolees and Probationers (1969) 31 U. Pitt. L. Rev. 167, 193-197: Note, Extending Search-and-Seizure Protection to Parolees in California (1969) 22 Stan. L. Rev. 129, 137-140.) It is simply not necessary in any way to effective law enforcement, much less to effective probation supervision, that all law enforcement officers be given the right to search probationers or parolees at any time for any reason.

There is also good reason to believe that such all-encompassing waivers of constitutional rights are not conducive to effective rehabilitation. Treatment of the probationer like a prisoner--stripped of all control over others' knowledge of him because he is not deemed to have sufficient internal controls or knowledge of himself --simply weakens the will of the prisoner to behave responsibly because he thinks it right. While such treatment may be justified and necessary within prison walls, the function of probation is to strengthen independent judgment and internal controls, and to give the individual

selective responsibility over his own actions. By completely denying him the right to privacy of his person, dwelling, and effects, the state thereby holds before the probationer a mirror image of himself as a person he should not trust. "Each search . . . chips away at the [individual's] belief that he has an opportunity to grow as an individual with his own set of behavior controls. The rehabilitation process is, therefore, retarded by each such search. . . ." (Note, supra, 22 Stan. L. Rev. 129, 135.)

In Rosales and Martinez this court recognized that persons released conditionally into the mainstream of society have Fourth Amendment rights. We refused to permit the executive to extinguish those rights. Yet the majority now turn their back on these principles and would allow the judiciary to extinguish those rights. The majority rely on the manifest fiction that a probationer "consents" to the condition of his relief. "The rationale is not particularly appealing. It makes constitutional rights dependent upon a kind of 'contract' in which one side has all the bargaining power. . . ." (People v. Hernandez, supra, 229 Cal. App. 2d 143, 148.) 1/

The majority justify the total waiver on the ground that the probationer " 'will be less inclined to have narcotics or dangerous drugs in his possession, . . .

1/ The fictional nature of the consent is made manifest by the majority's immediate abandonment of the rationale. If the majority really relied on a "consent" rationale, surely they would hold that refusal to consent to the search would be grounds for probation revocation but would not validate the search undertaken here.

Information obtained under such circumstances would afford a valuable measure of the effectiveness of the supervision given the defendant and his amenability to rehabilitation.' (People v. Kern, 264 Cal. App. 2d 962, 965.)" Such searches measure the effectiveness of rehabilitation in the same manner that one fells a tree to measure its age. It is high time that we recognized that a person must have the freedom to be responsible if he is to become responsibly free.

I believe the condition of probation to be invalid. I would affirm the order of dismissal.

PETERS, J.

I CONCUR:

TOBRINER, J.

APPENDIX "B"

IN THE COURT OF APPEAL,

FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)(	4 Crim. No. 4270
Plaintiff and Appellant,	)(	Court of Appeal - Fourth Dist.
v.	)(	FILED
	)(	JAN 28 1971
ROBERT ALOYSIOUS MASON,	)(	JOHN R. McDOWELL,
Defendant and Respondent.	)(	Clerk
	)(	Deputy Clerk

O P I N I O N

APPEAL from an order of the Superior Court of San Diego County. Robert O. Staniforth, Judge. Affirmed.

James Don Keller, District Attorney, Richard H. Bein and Steven B. Davis, Deputy District Attorneys, for Plaintiff and Appellant.

Neal Pereira, for Defendant and Respondent.

Robert Aloysious Mason was accused of burglary with an acetylene torch (Pen. Code §464), receiving stolen property (Pen. Code §496.1), possessing restricted dangerous drugs (Health & Saf. Code §11910), possessing the drugs for sale (Health & Saf. Code §11911) and possessing marijuana (Health & Saf. Code §11530). Having been bound over for trial at his preliminary hearing, Mason moved to suppress evidence of the stolen property, drugs and marijuana, claiming they were discovered in the course of an illegal search. The court granted the motion to suppress. When the deputy district attorney represented the People had no further evidence, the court dismissed the charges under Penal Code section 1385. The People appeal from the order of dismissal. We must construe all evidence and reasonable inferences from the evidence in favor of the court's implied findings in support of the orders suppressing evidence and dismissing the action.

Late in the evening of January 24, or early morning of January 25, 1970, burglars broke into the Alvarado Medical Center in San Diego. They cut into a safe with a cutting torch, broke into the Center's pharmacy and entered a doctor's office. Taken were money, stamps, retail sales items, a radio, 4,000 hypodermic needles and over 30,000 pills and capsules, mostly barbiturates or amphetamines.

About the time of the burglaries, an employee of the hospital located next to the Medical Center saw suspicious activity by two men in the parking lot. She and another employee noted the license number of the suspects' car and reported it to the police. The police traced the car's ownership to defendant Mason. The police also determined Mason lived at 2124 Reed Street in San Diego, had registered as a narcotics offender

and was a probationer subject to a probation condition he

> "Submit his person, place of residence, vehicle, to search and seizure at any time of the day or night, with or without a search warrant, whenever requested to do so by the Probation Officer or any law enforcement officer."

The police went to Mason's residence and saw his car parked in front of it. A police officer knocked on the door of the residence, loudly identified himself and announced he wanted to search the apartment. Mason opened the door. An officer told Mason he had "reason to believe [Mason] had participated in a burglary and . . . was subject to search and seizure by court order as a condition of his probation." Mason said he was subject to that condition. The officer did not request permission to search and admittedly did not give Mason an opportunity to refuse or grant permission. Instead, one of the officers immediately searched and found a radio in the kitchen. It was one of the items stolen from the Medical Center.

Another officer arrested Mason and took him away. The police then further searched the apartment and Mason's car. They did not have a search warrant. The search took place after Chimel v. California, 395 U.S. 752 [89 S. Ct. 2034]. The People do not contend the search met the standards of reasonableness for a search incidental to an arrest as announced in Chimel. The People's sole contention on their appeal is the search was justified by Mason's probation condition he submit to search when requested by the officers. The

deputy district attorney categorically told the court Mason gave no consent to the search.

In People v. Kern, 264 Cal. App. 2d 962, 965, we held a probation condition the probationer submit to search by law enforcement officers to be reasonable as a supervisional procedure related to the probationer's reformation and rehabilitation where the conviction was for a narcotics offense. Mason's probation condition was reasonable as it was based upon his earlier conviction for possessing marijuana. Here, however, the police did not ask Mason to submit to a search, as was required by the condition. The condition was never fulfilled by the officers; they made no request to search. A request implies a response will be given, either consenting or refusing. Instead, the officers proceeded on the assumption the condition gave them an automatic right to search without the necessity of a request and consent.

The district attorney contends Mason agreed to the officers' search when he accepted probation and its terms. We do not agree: Mason promised to consent to a search when asked by police officers. The agreement did not obviate the necessity the officers seek his consent. Submission is a yielding to authority and thus involves a coerced consent. The consent or yielding to authority takes place when law enforcement officers seek to conduct their search, not when probation is accepted.

The district attorney contends the search was justified because Mason had no right to violate his probation by refusing consent had it been requested. If the police had been entitled to employ self help upon a refusal to consent, Mason would not have been materially

prejudiced by absence of a police request for consent.

We are persuaded, however, a violation of probation conditions does not give rise to a police remedy of self help. In civil law, a breach of contractual conditions may give rise to legal or equitable remedies in the courts, but does not warrant self help. The rule disapproving self help as a civil remedy is based upon a policy against violence. Unnecessary violence is to be avoided in criminal law enforcement too. While there was no evidence of an expressed objection to the search by Mason, the police gave him no opportunity to object. Under these circumstances the trial court could reasonably find, in support of its order, Mason's silence was not a tacit voluntary submission to the search or a yielding to the police in obedience to the probation order. Were we to hold Mason's failure to object, when the police gave him no opportunity to object, justified the search we would be placing a premium on the use of force or violence. The reasonableness of the search should not depend upon police action preventing an objection.

Had Mason's consent been requested and had he refused to consent to a search, the police could have then arrested him for violating his probation and sought revocation of his probation.

In re Young, 121 Cal. App. 711, 716-717 says:

> "A violation of the terms of probation is not deemed to be a separate offense for which one may be punished independently of his original sentence. The breach of probation is inseparably associated with the original sentence."

By limiting the remedy for violation of probationary terms to procedures to modify or revoke probation, the disabilities of a probationer are made personal to him. Were the police authorized to enforce Mason's probation by a forceable search, it is possible, if not probable, the Fourth Amendment rights of others, not subject to his probation terms, would be violated.

We see no impediment to the administration of probation programs by this limitation on probation violation remedies, as is urged by the district attorney. Revocation of probation and imposition of sentence to prison should be a sufficient sanction to compel compliance with probation.

Since the court below correctly ruled the search was illegal and not authorized by Mason's probation conditions, and since no contention is made the dismissal was not authorized after suppression of the evidence, the order of dismissal must be affirmed.

Order affirmed.

BROWN
P. J.

I CONCUR:

AULT
J.

I dissent.

The threshhold problem is the meaning of the probation order. It is fitting that trial judges who impose such a condition of probation be told what they mean by it. If it means that defendant was ordered to voice a consent to search if requested in terms to give such consent, the trial court's decision must be upheld.

If, on the other hand, the order was that defendant submit to a search in the sense that submission is made to a search under a warrant, there is a further question of interpretation as to the meaning of "when requested." If that means that the probation or police officer must use the phrase "I request leave to search" or "May I search?" it is equally clear that no such phrase was used, and the trial court's decision must be upheld.

If the order requires only such an indication of a desire to search as a reasonable person would infer from the language and manner of the police officer, which is the reasonable meaning, another question follows:

Can there be a waiver of the constitutional immunity from search made without reference to a specific search, and is a search made on the strength of such a waiver a reasonable search? If the authorities hereafter cited support the affirmative then we must determine whether the probation order's requirement of submission to search by "any law enforcement officer" was a reasonable condition of probation under Penal Code section 1203.1, and whether under all of the circumstances preceding the particular search it was a reasonable one.

Finally, it must be determined whether defendant submitted to the search.

It is only if express consent were required to be given at the time of search that the trial court's implied finding no consent was given is significant.

While we are bound by the trial court's resolution of questions of fact, we need not accept its interpretation of the meaning of the order based solely upon the terms of the instrument. (Trubowitch v. Riverbank Canning Co., 30 Cal. 2d 335, 339.)

Judicial orders are to be construed under substantially the same canons of interpretation as other writings. (Verdier v. Verdier, 121 Cal. App. 2d 190, 193.)

A provision of a probation order similar to that under consideration is constitutional. (People v. Kern, 264 Cal. App. 2d 962; People v. Fitzpatrick, 3 Cal. App. 3d 824.)

There would be little point in arguing its constitutionality if its meaning and effect were that defendant should in express terms voice his consent to a probation or peace officer when the latter in express terms should ask if he might search. The constitutional question would not arise if in accepting probation the defendant waived no constitutional right: there would have been no waiver if his express consent must be given on every occasion of request to search.

The order could not be interpreted, of course, as requiring submission to a search that might be demanded capriciously and without reasonable justification.

The interpretation that the terms of probation merely ordered defendant when requested to give consent to a search makes redundant the language "with or without a search warrant." If there were a search warrant no consent would be necessary. If defendant was merely ordered to give consent, the mention of a warrant was meaningless: should consent be given, no warrant would be required.

The meaning of the probation order should not be determined merely with a view of what happened in the present case.

The interpretation of the order should not be influenced by the fact that McCain was a police officer who had knowledge of a new crime that might have been committed by the defendant, evidence of which was disclosed by the search. That fact goes rather to the reasonableness of the search under the circumstances.

The provision of the order that defendant submit his residence to search was probably because of the high incidence of recidivism among those convicted of narcotic violations, and was deemed necessary to exercise of effective supervision. It was not to obtain a consent to search or to test the willingness of defendant on occasion to consent to search, but to obtain a right to search with or without consent. Whatever value such an order might have as a psychological deterrent to possessing narcotics because of the possibility of an unexpected search would be lost by the trial court's interpretation of the order.

The interpretation placed upon the probation order by the police and the defendant is not irrelevant as to the reasonableness of the search.

When McCain told defendant he was subject to search and seizure by court order as a condition of probation, defendant stated "that yes, he was."

It is clear the police believed the order authorized a search upon demand; in that interpretation defendant concurred.[1] He voiced no objection to the search and made no attempt to deny to the police the right to search, and did not testify to any reason for not having so objected. Very evidently he believed the order authorized a search without expressed consent.[2]

Although the rules for interpretation of the order may be the same as for interpretation of contracts, it is doubtful that the acceptance of the terms of probation creates a contractual relationship between the court and the probationer; or that contract law analogies are appropriate.

Probation is a privilege, an act of grace or clemency. (In re Osslo, 51 Cal. 2d 371, 377.)

The order does not speak in terms of giving consent, but of submission; because of the use of the words "when requested by any law enforcement officer," in conjunction with the words "submit his person," etc., such a request is in fact a demand. The primary definition of the verb "demand" is to ask with authority.

The language and conduct of McCain implied a demand to search.

Fourth Amendment immunity may be waived in advance of a specific search; the waiver is not required to be made only in prior immediacy to a specific search. Within limits there may be a waiver general as to time

of search for searches to be made by certain public officials. (Zap v. United States, 66 S. Ct. 1277; Bowles v. Misle, 64 F. Supp. 835; Bowles v. Curtiss Candy Co., 55 F. Supp. 527, 531; United States v. Rabicoff, 55 F. Supp. 88; Tucker v. State, 224 A. 2d 111, cert. denied 87 S. Ct. 1381; People v. Allen, 96 N.E. 2d 446, cert. denied 71 S. Ct. 739; Zukowski v. State (Md.), 175 A. 595.)

In Zukowski v. State, supra, the court stated, at page 597:

> "The search which resulted in the discovery of the defnednat's illegal possession of liquor was made with his consent voluntarily and formally given, under the terms of the statute, to induce the issuance of a license to him for the sale of alcoholic beverages. The consent was none the less voluntary because of the fact that it was a prerequisite to his obtaining the license. In thus authorizing the search he debarred himself from contending successfully that it was unlawful."

Such waivers are usually with regard to licensees in businesses made subject to search by statute.[3]

However, in Zap v. United States, supra, 66 S. Ct. 1277, the waiver was a contract provision.

The order that defendant submit to search by any law enforcement officer was a reasonable condition under Penal Code section 1203.1. (People v. Kern, supra, 264 Cal. App. 2d 962; People v. Fitzpatrick,

supra, 3 Cal. App. 3d 824.)

Section 1203.2 gives a related power of arrest without a warrant to any peace officer. (See Pierce v. Board of Nursing etc. Registration, 255 Cal. App. 2d 463, 467.)

By accepting probation, Mason submitted his place of residence to search without a warrant whenever requested to do so by any law enforcement officer, subject to the limitation that the search be reasonable in other respects.

If the search was authorized by the probation order, it should be held to be a reasonable search if there were reasonable grounds to demand it.

The circumstances detailed as a matter of law gave good reason to search defendant's premises for narcotics if the purpose of the probationary order was to control defendant in his freedom to obtain and possess such drugs.

The visit of the officers, which was made shortly after 12:00 noon, was not unrelated to defendant's probationary status, in view of the terms of the probation order, [4] a copy of which had been furnished the police and seen by Officer McCain.

While the officers went to the residence for the purpose of making a search, their intention to do so was not capricious: they did so because they had reason to suspect defendant might be in possession of large quantities of restricted dangerous drugs.

McCain, the arresting officer, and the one who

> simultaneously, the duties of his office. [Citations.] In the nature of things, parole violations frequently must be brought to the attention of parole officers by regular police officers. Although the concept that a parolee's abode is simply an enlargement of his prison cell no longer seems valid, nevertheless the court should not engage in fine metaphysical distinctions as to which effort was primary and which secondary, the proper enforcement of parole or the solution of criminal cases."

The provisions of Penal Code section 844 must be observed in entering to search a parolee's residence (People v. Rosales, 68 Cal. 2d 299); and also when entering to search a probationer's residence (People v. Hayko, 7 Cal. App. 3d 604).

However, there is a point at which the analogy between the Fourth Amendment rights of a parolee and a probationer under an order such as that of defendant breaks down.

The narrowing of a parolee's Fourth Amendment rights against search is not one specified in the Penal Code sections on parole (§3040 et seq.). Judicial notice may be taken that it is not mentioned in the standard forms of parole agreement in use by the Adult Authority.

Here the probation order was specific and ordered submission to a search by the probation officer or any law enforcement officer.

In contrast to the situation in People v. Hayko, supra, 7 Cal. App. 3d 604, McCain in the instant case scrupulously observed the requirements of section 844.

Whether defendant might have withdrawn the waiver given by his acceptance of probation because he feared the rights of third parties might be affected by the search, or for any other reason, is not involved.

Had defendant voiced or otherwise indicated an objection, and if in the face of such objection the officers nevertheless made a search, we would be presented with a different problem. That they might have done so is irrelevant.

The proposition would seem to be self-proving that every search by a law enforcement officer, made in the presence of a person aware of what is going on and who evidences no objection by word or conduct, is one to which he gives his voluntary consent or to which he submits.

Submission is "a yielding to authority." The transitive verb "submit" means "to yield in surrender, compliance or obedience."

Not only does the trial court's decision necessarily imply that the search was not made upon a voluntary consent given at the time, but it is beyond question defendant did not at the time voice a voluntary consent.

Although a defendant's failure to voice an objection to a search has sometimes been considered as evidence of the reasonableness of the search (People v. Villarreal, 146 Cal. App. 2d 233, 238; People v.

Zavaleta, 182 Cal. App. 2d 422, 426), in the present case the only possible conclusion is that the search was made not as the result of a voluntary consent given at the time but in submission to an express assertion of authority based upon the probation order.

Where there is a voiced or implied consent, it may nevertheless have been the result of a wrongful assertion of authority and be in fact involuntary.

The waiver of the right under the Fourth Amendment to be free from unreasonable searches and seizures cannot be conclusively presumed from a voiced expression of consent. (Cipres v. United States, 343 F. 2d 95, 97.)[6]

Thus if the defendant here should give an apparent consent to a search by a probation officer which produced evidence of a new crime, it would still be possible for the probationer to claim with regard to such evidence that his apparent consent was coerced.

There can be no doubt that here any consent to the search that might otherwise be implied from defendant's apparent acquiescence was in submission to an express assertion of authority.[7]

There is no evidence from which it could be inferred he either did indicate or would have indicated objection to the search.

The question is whether that assertion of authority was legal or illegal.

A search is unreasonable if it is permitted in submission to an illegal assertion of authority. (Castaneda

v. Superior Court, 59 Cal. 2d 439; People v. Haven, 59 Cal. 2d 713; People v. Martin, 225 Cal. App. 2d 91; People v. Porter, 227 Cal. App. 2d 211.)

Not every search made in submission to an express assertion of authority is unreasonable.

Searches made under warrants are in submission to an express assertion of authority.

Even to such legal assertions of authority, the law furnishes instances of refusal to submit.

The defendant here made no such refusal. By failing to object in any manner, he complied with the probation order: he yielded the residence for search in compliance and obedience.

Defendant had been ordered to do so and that is what he did, thus obeying the probation order.

The trial court was concerned only with the correct interpretation of the order, and professed some doubts as to what that interpretation should be. The majority opinion, however, seems to suggest a policy that a court should not impose a condition of probation that would amount to a waiver of Fourth Amendment rights effective in future.

I would reverse.

WHELAN
J.

Footnote 1: In People v. Gorg, 45 Cal. 2d 776, 783, the court stated:

> "Under these circumstances the officers were justified in concluding that Stevens had the authority over his home that he purported to have, and there was nothing unreasonable in their acting accordingly. In this proceeding we are not concerned with enforcing defendant's rights under the law of trespass and landlord and tenant, but with discouraging unreasonable activity on the part of law enforcement officers."

Footnote 2: Although on cross-examination a question to and an answer of McCain were:

> "Q And in essence isn't it a fact that you did not give Mr. Mason an opportunity to refuse to allow you to search: isn't that correct?
>
> "A I would say that is correct."

that would be significant only if the effect of the probation order was that defendant should give his consent expressed in terms to a request expressed in terms by the police for permission to search.

Footnote 3: In contrast to most of the statutes, the statute under consideration in United States v. Cardiff, 95 F. Supp. 206, 207-208, provided:

> "The following acts and the causing thereof are hereby prohibited:
>
> "..."

"(f) The refusal to permit entry or inspection as authorized by section 704."

Section 704: "For purposes of enforcement of this Act, officers or employees duly designated by the Administrator, after first making request and obtaining permission of the owner, operator, or custodian thereof, are authorized (1) to enter, at reasonable times, any factory . . ."

The defendant there was convicted of refusing to consent to the inspection.

An interpretation of the probation order that it only commanded the giving of consent gives it the meaning of the quoted statute in the Cardiff case.

Footnote 4: Judicial notice may be taken of the records of this court. The record on appeal in case Crim. 4469 shows that the probation granted on September 3, 1969 by the order in question was revoked. It is not determinable from that record whether the revocation was because of the evidence discovered in the search of January 1970 or because of a conviction of possession for sale alleged in an indictment filed December 2, 1969 to have been committed on August 16, 1969.

Footnote 5: Although the police arrested Mason and took him away after one of the officers saw openly visible in the kitchen a radio stolen in the Alvarado Medical Center burglary, the rest of the search was made while a woman in the apartment remained there.

Footnote 6: "The substantial probability that the

unlawful entry was essential to securing consent and the inescapable uncertainty whether the consent was voluntary preclude treating the consent as an independent valid basis for the ensuing search of defendant's person." (People v. Haven, 59 Cal. 2d 713, 718.)

Footnote 7: The phrase used in the majority opinion, "tacit voluntary submission," would be inappropriate to use in describing the submission by a victim of forcible rape.

SUPREME COURT, U. S.
FILED
MAR 8 1972
E. ROBERT SEAVER, CLERK

In The Supreme Court of The United States

October Term, 1971

No. 71-803

ROBERT ALOYSIOUS MASON,

Petitioner,

v.

THE PEOPLE OF THE
STATE OF CALIFORNIA,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

EDWIN L. MILLER, JR.
District Attorney
County of San Diego
State of California

By: DANIEL W. FOX
Deputy District Attorney
County of San Diego

Attorneys for Respondent

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-803

ROBERT ALOYSIOUS MASON,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of the State of California (App. A of Petition) is reported at 5 Cal. 3d 759, 488 P.2d 630, 97 Cal. Rptr. 302 (1971). The opinion of the California Court of Appeal (App. B of Petition) is reported at 92 Cal. Rptr. 628 (Cal. Ct. App. 1971).

JURISDICTION

The Court does not have jurisdiction pursuant to 28 United States Code section 1257 because there has not been a final judgment rendered by the highest court in California in which a decision could be had.

QUESTION PRESENTED

When a valid condition of probation, previously accepted by probationer, directs him to submit to search and seizure, does the probationer have the right to violate his probation by refusing submission to a search or, instead, may the condition, consonant with the Fourth Amendment, be implemented by requiring the probationer's compliance with this term of his probation.

STATEMENT OF THE CASE

The facts leading to institution of the present criminal proceedings against petitioner are fairly and accurately stated by the majority opinion of the California Supreme Court in this case:

> In January 1970 burglars broke into the Alvarado Medical Center in San Diego and stole money, stamps, retail sales items, a radio, 4,000 hypodermic needles and over 30,000 pills and capsules, mostly barbiturates and amphetamines. At the time of the burglary, a hospital employee observed suspicious activity by two men in the parking lot; a second employee noted

the license number of their car, and reported it to the police. The officers traced the car to defendant, living at 2124 Reed Street in San Diego, and discovered that defendant had registered as a narcotics offender and was on probation for possessing marijuana in 1969. The officers noted that one of the conditions of defendant's probation required him to "submit his person, place of residence, vehicle, to search and seizure at any time of the day or night, with or without a search warrant, whenever requested to do so by the Probation Officer or any law enforcement officer."

The officers went to defendant's residence and saw his car parked in front. One of the officers knocked on the door of the house, loudly identified himself and announced that he wanted to search the apartment. Defendant opened the door and an officer informed him that he had reason to believe defendant had participated in a burglary and was subject to search and seizure by court order as a condition of his probation. According to the officer, defendant replied that he was subject to such a condition. Thereupon, without giving defendant the opportunity to refuse or grant permission for a search, the officers entered the house, searched and found in the kitchen a radio which resembled the one stolen from the Medical Center. They arrested defendant, took him away, and subsequently searched defendant's car and house, uncovering further items of contraband. (App. A of Petition 2.)

Two days after this search was conducted, petitioner was charged with several crimes. The crimes were burglary with an acetylene torch (Cal. Pen. Code § 461), receiving stolen property (Cal. Pen. Code § 496.1), possession of restricted dangerous drugs (Cal. Health & Safety Code § 11910), and possession of restricted dangerous drugs for sale (Cal. Health & Safety Code § 11911). Several days after this, on February 2, 1970, a fifth charge was added--that of possession of marijuana (Cal. Health & Safety Code § 11530).

Petitioner was bound over to stand trial in the Superior Court of San Diego County. However, a pretrial motion to suppress evidence, made by petitioner pursuant to California Penal Code section 1538.5, was granted and, upon the People's representation they had no further evidence to present, the case against petitioner was dismissed (CT 13). 1/

The People appealed to the California Court of Appeal, Fourth Appellate District (CT 9). By a 2-1 decision, this court affirmed, on January 28, 1971, the Superior Court's order of dismissal (App. B of Petition 6).

A petition for hearing by the California Supreme Court was granted on March 26, 1971. On September

---

1/ In this brief, the following abbreviations will be used to designate the various transcripts comprising the record on petition for writ of certiorari. "CT" designates the clerk's transcript; "Sentencing," the reporter's transcript of petitioner Mason's sentencing on September 3, 1969.

22, 1971, the California Supreme Court vacated the order of dismissal and the cause was remanded to the Superior Court of San Diego County for further proceedings (App. A of Petition 9).

Thereafter, petitioner Mason pled guilty to burglary in the first degree (Cal. Pen. Code §§ 459-60), stipulated to be a lesser included offense of burglary with an acetylene torch, and to possession of restricted dangerous drugs (Cal. Health & Safety Code § 11910). The remaining charges were dismissed on motion of the People (Respondent's App. A). On February 7, 1972, petitioner was sentenced to state prison. The court ordered the burglary and drug convictions to run concurrently with each other and with other prison sentences previously imposed (Respondent's App. B).

ARGUMENT

I

THE PETITION FOR CERTIORARI IS PREMATURE BECAUSE THERE IS NO FINAL JUDGMENT OF THE CALIFORNIA APPELLATE COURTS

Before the Court grants a writ of certiorari, there must be a final judgment "rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257. Since the California Supreme Court rendered its decision on September 22, 1971, petitioner has pled guilty to two criminal charges in this cause and has been sentenced to state prison. Clearly, under California law, petitioner has the right to appeal his convictions and raise anew the legality of the search

conducted in January 1970 of 2124 Reed Street, San Diego. [2]

Respondent concedes there is almost no chance petitioner will be successful in a second appeal to the California appellate courts. In several recent decisions, California courts have held that where appellate review is sought of an order finding a search and seizure legal or illegal, a determination of the question by the appellate court on its merits is thereafter binding at all future stages. Nerell v. Superior Court, 20 Cal. App. 3d 593, 597; 97 Cal. Rptr. 702, 704 (1971); see People v. Werber, 19 Cal. App. 3d 598, 602, 97 Cal. Rptr. 150, 152-53 (1971); People v. Vega, 12 Cal. App. 3d 970, 972, 91 Cal. Rptr. 167, 168 (1970). Nonetheless, futile as an appeal from petitioner's convictions may be, it seems a requirement of the Court's jurisdiction. As the Court said in Parker v. Illinois, 333 U.S. 571, 576 (1948), a somewhat analogous case:

> We find it no more unreasonable for Illinois to require a second appeal than for this Court to do so, as it does when it refuses to review the judgment of a lower state court absent a second appeal to the highest court of the State.

---

[2] Section 1538.5(m) of the California Penal Code Code provides:

> A defendant may seek further review of the validity of a search and seizure on appeal from a conviction in a criminal case notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty.

though that be a mere formality because governed by the law of the case established in an earlier appeal.

Upon his January 1972 convictions, until petitioner has sought review of the legality of the January 1970 search in the California Court of Appeal and California Supreme Court, there is no final state judgment and, accordingly, no jurisdiction. Great W. Tel. Co. v. Burnham, 162 U.S. 339 (1896); cf. Wilson v. Schnettler, 365 U.S. 381, 385 (1961).

II

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW

In January 1970 police officers searched petitioner's residence. They based their search on a term of probation to which petitioner was then subject. It was that petitioner was to "submit . . . to search and seizure . . . whenever requested to do so by the Probation Officer or any law enforcement officer." Petitioner argues this search was illegal. The basis of his argument, however, is unclear. Possibly petitioner is arguing that constitutionally a probationer never can be compelled to submit to search and seizure, no matter how explicit the probation order or how manifest the probationer's assent to such an order. Or perhaps petitioner is saying that while a probationer can waive his Fourth Amendment rights, "courts indulge every reasonable presumption against waiver," and since petitioner's September 1969 probation order is ambiguous, the doubt should be resolved in petitioner's favor. The Court should find, petitioner argues, he had the

right, by the terms of his probation order, to violate it by refusing to submit to search and seizure.

If the latter is petitioner's argument, clearly this case presents no important question of Federal law. What, in effect, petitioner asks this Court to do is grant certiorari so that it may interpret the language of a solitary probation order imposed in San Diego County in 1969.

Not only would this fail to be a special and important reason for granting the writ, Sup. Ct. R. 19, but upon review of the probation order, it would be manifest that petitioner's waiver of the Fourth Amendment met the rigorous test for waiver of any constitutional right set forth in Johnson v. Zerbst, 304 U.S. 458, 464 (1938). At his sentencing, petitioner was represented by able counsel. The terms of probation, as proposed by the sentencing court, were read by the court to petitioner and his counsel. The court then inquired of petitioner whether he understood what had just been said; petitioner replied that he did (Sentencing 3-4). Boykin v. Alabama, 395 U.S. 238 (1969), seems analogous to the question at hand; the analogy supports respondent's argument that petitioner intelligently waived his rights.

III

THERE IS NO CONFLICT OF DECISION

Assuming, however, petitioner's contention is that the state cannot constitutionally compel a probationer to submit to search and seizure, despite the probationer's previous agreement to do so, the petition for writ of

certiorari still should not be granted. Over 25 years ago, in a decision still viable today, the Court held that one can waive his Fourth Amendment rights in advance of any search that otherwise would be illegal. The California Supreme Court's holding to the same effect in the instant case is, thus, completely in harmony with applicable decisions of this Court.

In Zap v. United States, 328 U.S. 624 (1946), judgment vacated on other grounds, 330 U.S. 800 (1947), petitioner entered into contracts with the Navy Department. His contract provided that his records were to be open at all times to the Government and its representatives. Acting pursuant to this provision of the contract, FBI agents inspected petitioner's books. They discovered various documents that tended to prove petitioner had overcharged the Government for work he had done on the contract. Petitioner was convicted of presenting false claims against the United States after this evidence was presented in court.

This Court affirmed. It said:

> [T]he law of searches and seizures as revealed in the decisions of this Court is the product of the interplay of the Fourth and Fifth Amendments. But those rights may be waived. And when petitioner, in order to obtain the Government's business, agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts. (328 U.S. at 628.)

In all important respects, the instant case is the same as Zap. Petitioner could have been sentenced to

prison upon his conviction for possession of marijuana. He avoided this through receiving probation. He did not have to accept probation any more than Zap had to do business with the Government. He did, however, accept probation with one of the conditions being that, during his probationary period, he submit to search and seizure by a police or probation officer. Several months after petitioner's sentencing, this term of probation was the basis of a search of petitioner's residence. Petitioner had no more right to refuse to submit to search and seizure than petitioner Zap had the right to refuse inspection of his books by the Government's agents. Zap v. United States, 328 U.S. 624 (1946); cf. Katz v. United States, 389 U.S. 347, 358 n. 22 (1967).

IV

THE DECISION BELOW IS CLEARLY CORRECT.

Apart from the Zap decision, policy reasons support the decision of the California Supreme Court.

When petitioner appeared for his sentencing in 1969, he stood before the court a felon convicted of a narcotics offense. The judge would have been justified in sending petitioner to prison. Instead he gave him an opportunity to prove himself. 2/ In so doing, however, the judge was taking a risk. As the court below notes,

---

2/ "The word 'probation' derives from the Latin, its root meaning being 'a period of proving or trial.'" D. Dressler, Practice and Theory of Probation and Parole 6 (1959).

recidivism is particularly high for narcotics offenders (App. A of Petition 6 n. 2). Thus, one of the conditions upon which probation was granted was that petitioner consent to search and seizure.

The effect this condition is intended to have is rather obvious. "With knowledge he may be subject to a search by law enforcement officers at any time, [a probationer] will be less inclined to have narcotics or dangerous drugs in his possession." People v. Kern, 264 Cal. App. 2d 962, 965, 71 Cal. Rptr. 105, 107 (1968). If the condition has its intended effect, society is protected from further depredations by the narcotics offender. By offering this protection, the sentencing judge is thus warranted in granting probation.

A second desirable effect of the condition is that by refraining from possessing drugs or narcotics, because of the threat of search, rehabilitation of the narcotics or drug offender is facilitated. Neither of these desirable effects can be realized, though, if probationers, such as was petitioner, are free to refuse to submit to search and seizure. Compulsion, and only compulsion, is the force through which a probationer is made less inclined to possess dangerous drugs or narcotics.

Petitioner maintains that if the decision of the California Supreme Court stands, police will be given power to, in mass, conduct general, arbitrary searches. (The same argument could have been made by Zap.) That argument is best answered by the California court itself:

> We do not intend to suggest that one who has accepted such a condition to the grant

of probation is thereafter barred from objecting to the unreasonable manner in which that condition is carried out by police officers. For example, a probationer who claims unlawful harrassment by officers in executing a search may seek appropriate relief from the trial court, including an amendment of the order of probation. (App. A of Petition 7 n.3.)

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

EDWIN L. MILLER, JR.
District Attorney
County of San Diego
State of California

By: DANIEL W. FOX
Deputy District Attorney
County of San Diego

Attorneys for Respondent

APPENDICES

APPENDIX A

CR 20491

DA 6 2048

COURT CONVENES AT 9:45 A.M. / ~~P.M.~~
(time)

MONDAY, JANUARY 17, 1972
(date)

PRESENT:

HONORABLE FRANKLIN B. ORFIELD JUDGE
PRESIDING 7
(dept.)

CLERK MERRITT W. SMITH REPORTER Eve Reed, Reporter

THE PEOPLE OF THE STATE OF CALIFORNIA Frank Sexton
(Deputy District Attorney)

vs.

ROBERT ALOYSIOUS MASON (Defendant) NEAL PEREIRA (Attorney for Defendant)

CRIME OF PC 464; 496.1; H&S 11910; 11911; 11530; pr

☐ ARRAIGNMENT
☐ ARRAIGNMENT FOR JUDGMENT
☐ MOTION
☐ PROBATION
☐
☒ Readiness Conference

Comes now the District Attorney, and comes the defendant in person and by counsel. Upon leave of court the defendant withdraws his plea of, "Not Guilty," as heretofore entered and now pleads that he is guilty of the offense, PC 459 - 1st Degree Stip-LIO PC 464, Ct. 1 and H&S 11910, Ct. 3 as charged. Defendant makes application for probation.

and hearing thereon and pronouncement of judgment are set for Feb. 7, 1972 in Dept. Seven at 9:00 A.M.

On motion of People, Cts 2-4-5 are dismissed, and prior stricken in the furtherance of justice.

Defendant in custody. Bail as previously fixed is continued.

Cal. No. _____

CRIMINAL MINUTES CR-02 Co. Clk. (7-71)

The foregoing instrument is a full, true and correct copy of the original on file in this office.

Attest FEB 29 1972 19____

JESSE OSUNA, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of San Diego.

By Marjorie Lindberg Deputy
MARJORIE LINDBERG

APPENDIX B

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

JUDGMENT OF CONVICTION TO STATE PRISON

FILED
FEB 7-1972
JESSE OSUNA, Clerk
By Merritt W. Smith Deputy

No CR 20491

The People of the State of California,
Plaintiff,

vs.

ROBERT ALOYSIOUS MASON
Defendant.

Present:
Hon. FRANKLIN B. ORFIELD
Judge of the Superior Court

Edwin L. Miller, Jr.,
District Attorney.

By Steven Davis, Deputy

Neal Pereira
Dounsel for Defendant

Merritt W. Smith
Clerk

Eve Reed
Reporter

The defendant is duly arraigned and sentenced as indicated.

XXXXXXX

Whereas the said defendant having duly plead guilty in this court of the crime of

Burglary (PC 459), First Degree, a stipulated lesser included offense of Burglary with Explosives (PC 464), Count 1; and Possession of Restricted Dangerous Drugs (H&S 11910), Count 3; and allegation of prior felony conviction having been stricken,

and probation having been denied,

It is Therefore Ordered, Adjudged and Decreed that the said defendant be punished by imprisonment in the State Prison of the State of California for the term prescribed by law.

IT IS ORDERED that the sentences shall be served concurrently with respect to one another, and concurrently with respect to any prior incompleted sentence.

IT IS FURTHER ORDERED that credit be allowed for time heretofore served from April 10, 1970.

It is further ordered that the defendant be remanded into the custody of the Sheriff of the County of San Diego, to be by him delivered into the custody of the Director of Corrections at the California Institution for Men at Chino.

XXXXXXXXXXXX.

I hereby certify the foregoing to be a true copy

of the Judgment duly made and entered on the minutes of the Superior Court herein.

DATED: February 7, 1972

JESSE OSUNA,
[redacted], County Clerk

By _____, Deputy Franklin B. Orfield
Judge of the Superior Court
FRANKLIN B. ORFIELD

JUDGMENT OF CONVICTION TO STATE PRISON

The foregoing instrument is a full, true and correct copy of the original on file in this office.

Attest FEB 29 1972 19___
JESSE OSUNA, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of San Diego.

By Marjorie Lindberg, Deputy
MARJORIE LINDBERG